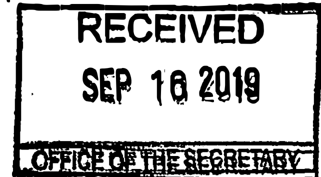
U.S. SECURITIES AND EXCHANGE COMMISSION

Matter of

CHRISTOPHER M. GIBSON, A.P. No. 3-17184

Respondent.



RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent Christopher M. Gibson submits the following proposed findings of fact and conclusions of law, pursuant to the Post-Hearing Order and 17 C.F.R. §201.340.

I. PROPOSED FINDINGS OF FACT

A. Respondent Christopher Gibson

1. Christopher Gibson graduated from Williams College in 2006 with a bachelors degree in economics and art history, and then worked on securitization financing as a junior analyst at Deutsche Bank in New York from June 2006 until February 2009. While associated with Deutsche Bank, he participated in its training program for analysts. He then returned to his home city of Augusta, Georgia and beginning in April 2009 worked for James Hull, whose primary business was shopping mall and other real estate development. His father, John Gibson, was Hull's business partner and "wanted him to get into the real estate business" on his return to Augusta. Gibson began by doing credit underwriting work to evaluate Hull's shopping mall tenants. (J. Gibson Tr. 1095-98, 1255, 1257; C. Gibson Tr. 76-80, 110)

2. Hull also asked Gibson to review Hull's investment accounts at Goldman Sachs and other firms. (C. Gibson Tr. 85) Hull was "just taken with" Gibson's "investment thesis" and, against the advice of John Gibson, moved about $20 million of his personal funds away from professional managers and began getting advice from then 25-year-old Gibson. (J. Gibson Tr. 1099, 1257) John Gibson did not think his son would have been placed in the position he held during the period at issue if John Gibson had not been Hull's business associate. (J. Gibson Tr. 1255) John Gibson was concerned that, in investment matters, his son "didn't have a full staff, didn't have a mentor." (J. Gibson Tr. 1257)

3. During the 2011 period principally discussed in the OIP, Gibson was 26 and 27 years old. His office was located down the hall from Hull in Hull's corporate offices in Augusta. However Gibson was still spending time in New York, where he was living from 2009 onward with the Giovanni and Suejin Marzullo family, whose only child Francesca was Gibson's "longtime girlfriend since college" and a full-time Ph.D. student at Columbia University. (C. Gibson Tr. 135-36, 1336-37; J. Gibson Tr. 1098, 1169-70)

B. Formation and Structure of GISF

4. This case involves Geier International Strategies Fund, LLC ("GISF" or the "fund"), which was an investment fund formed at the beginning of 2010. (DX-21; Hull Tr. 550) GISF's "managing member" was Geier Capital, LLC. The "managing director" of Geier Capital was Respondent Christopher Gibson. GISF's "investment manager" was Geier Group, LLC, which was "responsible for certain administrative and investment advisory matters" at GISF. (DX-24)

5. GISF's foundational documents consisted of a January 2010 Confidential Private Offering Memorandum, and an Operating Agreement dated as of 1/1/2010. (DX-24; DX-21) As disclosed in the Offering Memorandum, GISF's legal counsel was Seward & Kissel LLP, a New York law firm. (DX-24, p. 3) Seward & Kissel created GISF's fund structure, and Gibson testified that he selected them as legal counsel after he "performed an exhaustive search ... and ultimately identified Seward & Kissel as the leading and preeminent law firm providing advice to form a hedge fund of this nature." (C. Gibson Tr. 1334-35)

6. Geier Capital and Geier Group were both owed 50% by Christopher Gibson, 35% by James Hull, and 15% by Christopher Gibson's father John Gibson. (Hull Tr. 541-43, 671) Hull is "in the real estate development and financing business." His company, Hull Property Group, has been in business for "over 40 years." (Hull Tr. 520) It previously "was at one time called Hull Storey Gibson," and Christopher Gibson's father John Gibson was for "10, 12 years, maybe perhaps longer," a co-owner of Hull's company. (Hull Tr. 520-21)

7. According to its Form ADV, filed with the SEC, Geier Group's address was the same as that of Hull's company in Augusta, and Geier Group's president was Christopher Gibson. Christopher Gibson was "an employee of [Hull's] company" and performed services for Hull's real estate business, which also paid Gibson "advances," that were "in the form of a loan" that Gibson or Geier Group "was going to repay." (DX-12; Hull Tr. 544-47) Gibson was Geier Group's only employee. (Hull Tr. 550)

C. Concentrated Ownership of GISF

8. Hull and Gibson-related investors owned over 90% of GISF. Hull had personally invested approximately $26 million in GISF, and thus "own[ed] 80 percent of the fund." (Hull Tr. 529, 588, 664) Respondent "Christopher [Gibson] and his family own[ed] 10 percent of the fund." (Hull Tr. 529) The Gibson-related investors included Christopher Gibson personally, his

father John Gibson, his mother Martha Gibson, and Giovanni Marzullo, the father of Christopher Gibson's longtime girlfriend and in whose home Gibson was then living. (Hull Tr. 557, 561; C. Gibson Tr. 135-36, 1336) So Hull was the largest investor, and Gibson's parents "were the second largest investors in the fund with the Marzullos immediately behind us." (J. Gibson Tr. 1111-12)

9. As GISF's approximately 80% owner, it was "important" to Hull that Christopher Gibson "be invested in the fund he was managing," that his interests be "aligned" with Hull and GISF, and that he have "total focus on the fund." (Hull Tr. 561-62) In light of this, Hull personally loaned money to Christopher Gibson for him to use to invest in GISF. If Hull did not "require" Gibson to do this, Hull "strongly, strongly urged" it. (Hull Tr. 563) Hull "had a lot of money riding on" GISF and "wanted [Gibson] to be fully invested in the fund. Hull "was the moving party" on this, and "thought it was great that [Gibson's] family and his fiancee's family was invested," so Hull "pushed" for this. (Hull Tr. 563-64) Ultimately Hull's loan to Gibson for investment in GISF "was repaid" to Hull as part of a large real estate transaction with Gibson's father. (Hull Tr. 566)

10. Beyond the over 90% of GISF owned by Hull and Gibson-related investors, the remaining approximately 9% of GISF mostly "was owned by [Hull's] closest business associates and friends, long-term friends." (Hull Tr. 529, 541) Hull testified that neither he nor Gibson "would do anything contrary to those interests," and that "it is absurd" to think that Hull and Gibson would "want to hurt ourselves." (Hull Tr. 529)

11. Hull "knew and still know[s] many of ... the individuals from Augusta, Georgia who invested in the [GISF] fund." Among these 9% investors, Hull knows Mason McKnight IV and Matthew McKnight, who both testified at the hearing, as well as their father Mason McKnight III. Mason McKnight IV called Hull "a family friend" he has known "as long as I can remember." (Mason McKnight Tr. 742) He agreed that Hull would not intentionally "let anything happen to the investors of the fund in which he owned 80% and so many of the investors were his personal friends." (Mason McKnight Tr. 773) After meeting with Hull and Gibson to talk about the fund, he invested $50,000 of his own money, and his father loaned him and two of his brothers each a like amount to invest because his father "wanted to be involved in the fund." Mason McKnight Tr. 744, 775, 778-79) His brother agreed that it was their father "who got [him] interested in [GISF] to start with." (Matthew McKnight Tr. 831)

12. Hull has "known the McKnights all [his] life," and they own "construction companies based in Augusta." (Hull Tr. 523) Several other McKnight family members also invested in GISF, including Will McKnight, Marshall McKnight, and John Engler, a nephew of Mason McKnight III. (Hull Tr. 557-58, 676-77, 678) The "Hull-McKnight Building" at the Georgia Cyber Center is named after Hull and his "close friend" Will McKnight. (Hull Tr. 678-79) Hull and the McKnights "have done business ... for 40 years," and "had a lot of successful ventures together and ... made a lot of money together in various things. (Hull Tr. 558-59)

13. Also among these 9% investors in GISF were: Wayne Grovenstein, who "is the general counsel of" Hull's company. (Hull Tr. 517-18, 557) Another Hull employee of "12 or 14 years" named John Hudson. (Hull Tr. 680) Augusta CPA Doug Cates, a friend of Hull's. (Hull Tr. 676) Nick Evans, "a very close, trusted friend" of Hull's. (Hull Tr. 677) TR Reddy, who had a done "30 or 40 real estate transactions over 40 years" with Hull. (Hull Tr. 677) Scott Benjamin, Hull's stockbroker in Augusta who "decided he wanted to invest." (Hull Tr. 677-78) And Bert Storey, whom Hull described during his testimony as "my long time 40-year business partner, my mentor who is recently deceased and there never was a finer man," with whom Hull "owned a lot, a lot of property together and still do with his estate." (Hull Tr. 678)

14. Of those 9% GISF investors in Augusta that Hull knew, Hull spoke personally with "every one of them" before they invested. (Hull Tr. 680; C. Gibson Tr. 1337-38) In doing so, Hull was "very clear that it was a ... high-risk type venture." (Hull Tr. 681; C. Gibson Tr. 1338-39) GISF's offering memorandum stated that the fund involved "significant risks" and was "suitable only for those persons who can bear the economic risk of the loss of their investment" and had "limited need for liquidity in their investment," and that it was "a highly speculative investment" that was "designed only for sophisticated" investors. (RX-8, pp.1, 7) Hull and the other investors "all were what I would call sophisticated people that had a lot of different investments." (Hull Tr. 682) In contrast, unlike the other 9% investors, it was Gibson and not Hull who introduced Gibson's friend Tim Strelitz to GISF. (Hull Tr. 680)

D. Decision-Making at GISF

15. Hull was personally involved in decision-making at GISF. Hull testified that "as an 80 percent owner of the fund, I insisted that any major decision, that I would be a party to it and have approval of it." (Hull Tr. 569-70) Hull said that "any major decisions would first have to be approved by me," and "if I approved [Gibson's] decision, we would go forward. If I didn't, then we wouldn't." (Hull Tr. 570-71) Hull explained that he "owned 80 percent of the fund, [and] I put ... my closest friends in the other 10 percent of the fund. ... I'm known as somewhat of an irascible person and ... have that desire to be involved and ... to have things go the way I want them to go." (Hull Tr. 568)

16. Hull believed that the other GISF investors were aware that he had approval authority over any major investing decision in the fund. They "all were very much aware of [Hull's] 80 percent" investment in GISF. And "all of these people are very close to me. They know my personality. I've testified earlier I've got a controlling personality so I don't think any of them would have thought otherwise." (Hull Tr. 735)

17. Doug Cates, one of the 9% investors in GISF, is a CPA and has worked as an accountant in Augusta for 40 years. (Cates 1281-82) Cates was the accountant both for the McKnights and for the Gibsons, the two Augusta families that included multiple GISF investors, as well as for Geier Group and Geier Capital. (Cates Tr. 1305) Cates testified that, after Hull personally presented the GISF investment to him, Cates understood that Gibson would be "doing

the research," but that Hull "was going to make the decisions" for GISF. (Cates Tr. 1283, 1287) Cates further testified that he then received and read the GISF documents, and that after doing so he continued to understand that Hull "would be involved in running the fund." Cates testified that he would not have invested in GISF if Hull "had not been involved." (Cates Tr. 1332)

18. Although Cates was by profession an accountant, he had taken the Series 65 exam, the Uniform Investment Adviser Law Exam for investment advisers that is administered by FINRA. (Cates Tr. 1306-07; www.finra.org/industry/series65) Cates said that he had personally invested in limited partnerships before and had reviewed such investments by his accounting clients, and Cates understood that an investment in GISF "was a complete risk-taking investment." (Cates Tr. 1282, 1288; RX-57)

19. "The original investment thesis of the GISF fund was to invest in gold and other commodities." (Hull Tr. 539) Gibson "generated the original investment thesis for the fund." Hull "had a role in that," and "was a promoter of that thesis." Hull "bought into the thesis and thought it was correct." (Hull Tr. 540-41) During its first year, GISF was "very successful, made over 100 percent return." (Hull Tr. 673; C. Gibson Tr. 1345) But GISF "encountered some adverse income tax [consequences] ... pertaining to investing in metals. They have unfavorable tax treatment." (Hull Tr. 540, 575-76) Hull then was "involved in" the decision to get out of those investments "and go to equities." Hull "want[ed] that done." (Hull Tr. 673)

20. During 2010, GISF was "up 110 percent" following Gibson's investment thesis, which Hull approved, which involved "a number of fairly complex strategies" in arbitrage transactions that were "very successful." The trading included a "wide number of investments, trading daily in and out of positions." (C. Gibson Tr. 1362-63) When GISF was investing mostly in commodities, Gibson "was providing the expertise and was trading." But in 2011, when GISF concentrated its investment in a single stock, as described below, the investment decision was reduced to "buy, hold sell," and it was ultimately Hull who was "very, very intensely engaged in that process," and "making those calls." (J. Gibson Tr. 1170, 1258)

E. GISF's Investment in TRX Stock

21. As a real estate developer accustomed to tax minimization opportunities, Hull was "very, very irritated" on learning that GISF's profitable commodities trading in 2010 would result in a "substantial" tax bill. Hull wanted to move GISF into equities to at least benefit from long-term gains and avoid higher taxation on short-term gains. When informed that covering multiple equities would likely involve hiring additional personnel, Hull resisted as he "liked the efficiency of the operation [GISF] had at that time," and "liked the idea of [GISF] owning a single stock." (C. Gibson Tr. 1365-66) Gibson could not have resisted Hull's desire to concentrate GISF in a single stock, and his only option would have been to resign from GISF. (C. Gibson Tr. 1509-10)

22. Gibson selected TRX for investment by GISF and recommended it to Hull. Gibson "recommended that the fund ... invest in TRX." (Hull Tr. 575) Hull "became a believer" that "the underlying assets of TRX had ... great value." (Hull Tr. 576) Hull agreed with the recommendation, and agreed with the plan to invest all of GISF's assets in Tanzanian Royalty Exploration Corporation ("TRX"). (Hull Tr. 673-74) Hull favored investing in a "junior" mining company because it offered more upside potential, and Gibson recommended TRX because it offered the diversification of 46 mining properties and a "royalty model" that allowed it to partner with larger and better-capitalized companies. (C. Gibson Tr. 1351)

23. In a 2/6/2011 email, Gibson informed the other GISF investors that "we are now highly concentrated in a single equity," that he "strongly believe[d] merit[ed] this positioning." Gibson identified the investment as TRX, "a junior mining, exploration and royalty company that controls approximately half of the land prospectable for gold in Tanzania." (DX-48) After this report to investors that GISF was now "highly concentrated" in TRX, none of the GISF investors asked for more information or sought to redeem. (C. Gibson Tr. 1346)

24. After peaking at $7.46 on 6/1/2011, TRX stock generally declined in price. (JX-1; C. Gibson Tr. 1347) Gibson could not understand the price decline, as the gold price was then "doing very well." (C. Gibson Tr. 1373) On 8/5/2011, Hull emailed Gibson that GISF had "now lost a great deal of our gains last year," and that "none of our reasoning/predictions have come to bear." (DX-75) Gibson responded that, based on TRX's "strategy over the next months," he believed that "a game plan has been established that will succeed." (DX-75)

25. But Hull explained that "we were very concerned about Jim Sinclair," TRX's president, "not doing the exploration" that was needed. (Hull Tr. 582) TRX won a Tanzanian auction for a valuable mining property, TRX got a capital infusion of $30 million from Platinum Partners, and the gold price was increasing. But TRX's stock price was declining. (C. Gibson Tr. 1377-79) Gibson reacted with a series of emails to Sinclair at TRX that Gibson hoped would succeed in "instilling a sense of urgency in Mr. Sinclair." (C. Gibson Tr. 1379-80) In particular, Gibson faulted Sinclair's failures in communication of information about TRX to the market. (C. Gibson Tr. 1380-81) While Gibson was upset with Sinclair being "delayed in making announcements that [Gibson] felt would be constructive and supportive of" TRX, Sinclair's delays "had no impact on the 46 [TRX mining] properties, their economic value and the value of the company." (C. Gibson Tr. 1381-82)

26. Hull characterized Gibson as someone who "would run very hot and cold and I'm sure that he cussed out, ... in front of me, TRX and Jim Sinclair and ... would go unhinged on them and would be ... nice in an email like" DX 75. (Hull Tr. 583) Gibson "would rant and rave about different things, including about "Jim Sinclair in a negative way." (Hull Tr. 584) "[O]n several occasions, Chris would advocate exiting our position." Hull would question this viewpoint in view of the "huge underlying assets" of TRX. (Hull Tr. 586-87).

F. GISF's Rejection of Bid for All of Its TRX Stock on 8/23/2011

27. In his 8/22/2011 email to GISF investors, Gibson concluded that he "believe[d] very strongly we are in the right company in the right asset class at the right time," and that he was "confident that the miners [companies like TRX] will catch up this fall in a significant manner and in short order." As for TRX in particular, he cited TRX's "unique and diversified, although poorly understood, business model that limits its downside risks and offers tremendous leverage to the gold price." He noted TRX's "portfolio of royalty agreements [that] offers the potential of future income streams for which the company does not bear responsibility for exploration and development costs"; TRX's business of "exploration for its own book" that had proven successful; TRX's move into production on four mining projects; and TRX's "extensive long-standing relationships with senior government officials" in Tanzania, which Gibson had confirmed on his recent diligence visit to Tanzania, and which he believed would be valuable with upcoming auctions of additional mining properties. (RX-51)

28. On 8/22 and 8/23/2011, Gibson had an email exchange with Richard Sands, an investment banker at Casimir Capital. Sands believed he had a buyer willing to take over GISF's entire position in TRX, but Gibson responded that he wanted a premium above the then $5.85 market price. (RX-177) Sands then called Gibson and bid $5.85 for GISF's full 9.8 million-share TRX position, but Hull and Gibson determined to reject the offer. (C. Gibson Tr. 1386) The rejection of the offer is reflected in an email a month later in which Sands commented that the last time he made a bid for GISF's TRX stock, GISF "went away," and that it makes Sands "really look dumb" if on presenting a bid, GISF is "not there." (RX-62; C. Gibson Tr. 1386-88) Gibson felt it was possible to get a premium, as short sellers then needed to buy TRX stock to cover their short positions, and some large TRX holders desired to take over the company. (C. Gibson Tr. 1385) The Division's expert acknowledged that, in selling a block of shares, it is possible to obtain a premium above market price, including in circumstances where the buyer is a large short seller that needs to close out a position, or where the buyer wants to assemble a large block of shares, perhaps to begin a takeover of the company. (Dr. Gibbons Tr. 487-88)

29. There were additional large investments in TRX around this time. Casimir Capital was separately advising hedge fund Platinum Partners, which had recently made a $30 million investment in newly-issued TRX shares. (C. Gibson Tr. 1348, 1372) By September 2011, Platinum Partners owned about 7 million shares of TRX. Additionally, an investor in the United Arab Emirates, represented by Portuguese adviser Luis Sequeira, owned another 10 million shares of TRX. And BPI, a Portuguese bank, owned yet another 10 million shares of TRX. These were all recent investments in TRX. (C. Gibson Tr. 1353; DX-81)

30. During the month following Gibson's 8/22/2011 email to GISF investors and 8/23/2011 rejection of the Sands-Casimir bid for all of GISF's TRX shares at the $5.85 market price, TRX stock stayed essentially flat, trading around the $5.70s and $5.80s. (JX-1) Hull had "over $26 million in this fund so I was certainly questioning everything." But Hull "believed the underlying assets of TRX were tremendously undervalued and the stock was a good value." He

also noted that GISF "had no reason to have to sell." Hull felt "that this was good value and it was just a matter of hanging on" with GISF's investment in TRX. (Hull Tr. 588)

G. GISF's Response to TRX Stock Drop on 9/22 and 9/23/2011

31. A month later, on Thursday 9/22/2011, TRX stock dropped dramatically. After closing at $5.57 the day before, it opened at $5.42, hit a low of $4.41, and closed at $4.58, thus losing about 18% of its value in just 24 hours, on exceptionally high volume of 1,449,738 shares. (JX-1) "It was a big decline" that day. (Dr. Taveras Tr. 990; Dr. Gibbons Tr. 496) Hull reacted in a late afternoon email to Gibson by asking whether he should "put another [$]500,000 in TRX if it's in the low [$]5s." Gibson responded that he remained "very bullish" on TRX, but that he did not recommend adding to the investment in TRX at that point. (RX-52) Hull "floated the idea of increasing [GISF's] position and purchasing more [TRX] shares in light of the decline in the share price." (C. Gibson Tr. 1389)

32. The following day, Friday 9/23/2011, Gibson reported to GISF investors that "in light of the weakness in the shares of [GISF's] core position," TRX, "the value of the fund has now declined to only slightly above original investments last year." Gibson told the investors that 90% of the investors would remain invested, including Hull and Gibson, but that no management fees would be charged to the fund as of the end of the month. (DX-81; Hull Tr. 601-02; C. Gibson Tr. 1354-55) With the TRX price continuing to decline that day, Hull expressed "a greater desire to purchase more shares," but Gibson recommended that they "pause and wait and watch." (C. Gibson Tr. 1390-91)

33. On 9/23/2011, TRX suffered another "significant decline" in price. (Dr. Gibbons Tr. 496-97) After opening at $4.55, it dropped to a low of $3.93, before closing at $4.07, again on exceptional volume of 1,266,357 shares. (JX-1) Gibson's judgment at the time and today is that this two-day stock drop reflected what he called a "bear raid," which he described as "a strategy that short sellers utilize to undermine the sentiment in a security that they're short, in other words, selling a large amount of shares in order to push the share price lower on no news." (C. Gibson Tr. 1400)

34. Around the end of the trading day, Gibson had GISF sell off a relatively small amount of its holdings in TRX, approximately 78,000 shares, at a price of $4.04. (RX-17; Dr. Taveras Tr. 990-91, 1000-01, 1072-73; C. Gibson Tr. 1391) At the end of the day on Friday, there was no pending order for any other GISF sale of TRX shares. (Dr. Gibbons Tr. 497-98)

35. Hull and Gibson spoke over the weekend of 9/24-9/25/2011. Gibson's "recommendation [was] to sell TRX," but Hull was "not in favor of liquidating the fund's position in TRX." (Hull Tr. 602-04) By the end of the weekend, Gibson "had a general guidepost to get out of TRX at good prices." (Hull Tr. 604-05) After having "expressed a desire to purchase more" TRX shares on Thursday and Friday, Hull over the weekend indicated that he "wasn't sure he had a tolerance for more losses," which Gibson "interpreted as a potential

posture to consider a sale" of GISF's TRX shares. (C. Gibson Tr. 1392) Gibson determined to "solicit a bid" and give Hull "an array of options to consider," but Gibson's "judgment was that, as occurred the previous month, [Hull] would reject" a bid to sell GISF's TRX shares. (C. Gibson Tr. 1393)

H. Gibson's 9/26/2011 Sale of TRX Shares

36. The first of the Division's three charges against Gibson in this matter is that, after deciding to sell GISF's TRX shares, he sold TRX shares on behalf of himself and a Marzullo account at $4.04 on 9/26/2011, and then sold TRX shares on behalf of GISF at $3.50 on 9/27/2011, when the market price was lower. (OIP ¶¶28-29) The Division charges that Gibson was thus "improperly exploiting the fact that the Fund would be selling a substantial portion of its TRX position." (OIP ¶31)

37. In responding to these allegations, Gibson has presented an expert report and testimony from Daniel Bystrom. (RX-228) Bystrom has worked about 27 years in the securities industry, during which time he has worked as a portfolio manager at hedge funds with a focus on volatility, has worked as a trader at several banks and broker-dealers and has traded options, and has engaged in hedging activity using options to hedge his risk exposure. He presently oversees risk management at a New York-based registered investment adviser. (Bystrom Tr. 1552-54)

38. Based on his experience and the TRX price-volume chart in evidence (JX-1), Bystrom observed that "over the periods in question ... there was quite a lot of volatility in TRX." (Bystrom Tr. 1554) As "a stock with high volatility," he said that "it would be more reasonable to expect large moves" in TRX's stock price. So he agreed that "there would be no way that you could predict future price" for TRX stock. (Bystrom Tr. 1555)

39. On the evening of Sunday 9/25/2011, Gibson emailed Richard Sands at Casimir Capital. Gibson's email said that GISF "believe[d] in the company [TRX] and presently contemplate[d] waiting it out." Gibson mentioned that GISF was not leveraged and not subject to a redemption risk. But as GISF was "concentrated in TRX," Gibson asked Sands to let him know "if there is a buyer that sees current prices as very compelling as we otherwise would." (RX-62) By this email, Gibson was "intending to solicit a bid for our position while at the same time clarifying that we are not a motivated seller." (C. Gibson Tr. 1401) Bystrom considered this Sunday evening email and testified, based on his industry experience, that "[t]here is no order at that point" for GISF to sell TRX shares. (Bystrom Tr. 1556-57)

40. The Division's expert acknowledged that the next day, Monday 9/26/2011, there was still no pending order for GISF to sell TRX shares. (Dr. Gibbons Tr. 499). At that point, GISF could sell its TRX shares on the market or to a block purchaser. Such a block purchaser could appear that day, two days later, or two weeks later. (Dr. Gibbons Tr. 499-500) Nothing was forcing GISF to sell TRX shares, and it could have continued to hold the shares and benefit from an increase in the price of the stock. By March, TRX shares were trading above $5. (Dr.

Gibbons Tr. 500) There was on 9/26/2011 no telling when a block purchaser would appear. If a purchaser did appear, and the purchase offer was not to GISF's liking, GISF did not have to take the offer and could instead just have continued to hold the shares. Whether GISF would or would not accept the offer would depend on the terms, including how much would be purchased, the price and market conditions. (Dr. Gibbons Tr. 501) It was also possible that a purchaser would agree to purchase a block from GISF and then walk away from actually doing a transaction. (Dr. Gibbons Tr. 504)

41. On Monday 9/26/2011, Richard Sands at Casimir asked how many shares GISF had for sale, and Gibson responded that he could sell his "entire position which is 10,250,000 shares or anything less than that." (RX-62) In providing this number of TRX shares potentially available for sale, Gibson "combined" both those held by GISF and those held separately by Hull, which represented "the only other significant block of shares [Gibson] was aware of." (Gibson Tr. 1404-05) Gibson's emailed response told Sands that Gibson was "trying to do what is best" for GISF investors, and that if he could "return their money at a profit," he wanted to do so, even though Gibson believed that TRX was a "ten bagger" going forward." (RX-62) By this, Gibson meant to "further emphasize" to Sands "that we're not a motivated seller," and "that we are very price sensitive." Gibson wanted Sands "to be well aware of the fact that if the price isn't good, we're not going to transact." (C. Gibson Tr. 1405) By "ten bagger," Gibson was telling Sands that TRX was "worth 10 times what it is currently trading at." (C. Gibson Tr. 1406)

42. Later on Monday, Sands emailed that he thought he was going to get 3 to 5 million shares sold. (RX-62) Bystrom considered this string of Monday emails between Gibson and Sands. Again Bystrom testified, based on his industry experience, that there was still "no order" for GISF to sell TRX shares "by the end of the day on Monday." (Bystrom Tr. 1557-59)

43. TRX stock remained relatively stable on Monday 9/26/2011, opening at $4.07 and closing at $4.11, on more typical volume of 475,514 shares. (JX-1; Dr. Taveras Tr. 1002) During this stable day for TRX, Gibson sold 2,000 TRX shares that he held in his Schwab personal brokerage account, and 1,000 shares in Geier Group's Schwab account (in which Gibson had a 50% interest), meaning that Gibson effectively sold 2,500 shares for his own account on Monday. He also sold 18,900 shares in a Schwab account in the name of the Marzullo daughter. Gibson's sales were at approximately $4.04. (RX-23, 26, 29; C. Gibson Tr. 1394-95) As noted above, this was the same $4.04 price that GISF had just obtained in selling 78,000 of its shares on Friday, the previous trading day. (RX-17; Dr. Taveras Tr. 1004; Dr. Gibbons Tr. 508-09)

44. Alternatively, Gibson could have withdrawn all or a portion of his interest in GISF at any time if he had chosen to do so. (C. Gibson Tr. 127) Gibson's personal sale of 2,500 TRX shares out of his Schwab personal brokerage account on 9/26/2011 represented a "little under 1 percent" of his overall exposure to TRX stock, considering his investment in GISF, and came at a time when he had no assets and management fees had just been suspended. (C. Gibson Tr.

1394-95) The Marzullo account's sale of 18,900 shares that day represented "approximately 4 percent, maybe a little higher, under 5 percent of the total shares [of TRX] beneficially owned by the Marzullos." (C. Gibson Tr. 1397)

45. The Marzullo account in which Gibson sold the shares "was conceived by Giovanni Marzullo," father of Francesca Marzullo, and it was Giovanni Marzullo who solely funded the account. (C. Gibson Tr. 1395, 1397) Gibson explained that "Mr. Marzullo wanted to open an account to buy securities in 2009. He decided to open it in the name of his daughter. Since 2009, I was I believe exclusively responsible for the trades in that account and I reported those trades and discussed them daily with Mr. Marzullo." (C. Gibson Tr. 1396-97) Gibson lived in New York "for many years," including from 2009 onward, with the Marzullo family, whose only child Francesca was Gibson's "longtime girlfriend since college" and a full-time Ph.D. student at Columbia University. (C. Gibson Tr. 135-36, 1336-37, 1397; J. Gibson Tr. 1098, 1169-70)

46. After selling his personal holding of 2,500 TRX shares, Gibson remained "not only significantly long" in his TRX exposure, but also "more significantly long than any other member of" GISF. Gibson was "the only member of the fund who had all of their net worth in" GISF, the only GISF member "who had extraordinary leverage" of his fund position (arising from his loan from Hull to invest in GISF), and "the only member of the fund with no income at that time" as with the management fee suspended, his monthly checks from Hull's firm were simply "accruing a liability to repay," thus increasing his debt. (C. Gibson Tr. 1398)

47. Throughout Monday, the day that Gibson sold his 2,500 shares and Marzullo's 18,900 shares, there was still "no order" from GISF to sell shares. (Bystrom Tr. 1559) At the end of the day on Monday, "no one knew what the price would be on Tuesday." (Bystrom Tr. 1563) On Monday TRX closed at $4.11, but it "doesn't have to open at the same price" the next morning. (Dr. Gibbons Tr. 509-10) Gibson would not have known at the end of the day on Monday what it would open at the next morning. He would have needed a crystal ball for that. (Dr. Gibbons Tr. 510) TRX could have gone back up to $5.42, where it had been trading just two trading days before. (Dr. Gibbons Tr. 510) Gibson did not know on Monday evening whether a block buyer would appear and make an offer on Tuesday. (Dr. Gibbons Tr. 511)

I. GISF's 9/27/2011 Sale of TRX Shares

48. The following morning, Tuesday 9/27/2011, after closing at $4.11 the day before, TRX opened higher at $4.24 and then rose further to $4.34 during Tuesday morning. (JX-1) However with the price at $4.34 on Tuesday morning, the amount of shares that could be sold by GISF was still unknown, only that it would "likely" be 3 to 5 million shares. And the price and timing of a transaction had still not been determined. (RX-62) Gibson at that point did not know whether Hull would approve a sale at whatever price and number of shares might be in Sands' bid. (C. Gibson Tr. 1415) In the absence of a sale price and number of shares to be sold, there was still no order for GISF to sell TRX shares. (Bystrom Tr. 1559)

49. Sands was trying to find a buyer for GISF's TRX shares in what is called the "upstairs market," meaning in a negotiated transaction matching seller and buyer away from the exchange floor. (Bystrom Tr. 1563) In the upstairs market, a prospective seller will not know when they will get a bid, and it "could certainly be days or weeks later." (Bystrom Tr. 1563-64) Based on dealing with the upstairs market on a "somewhat regular" basis over 27 years, Bystrom also noted that it is "certainly not uncommon that even when" a person like Sands "has a firm order on one side, that there is never a transaction consummated," or no transaction until some future date. (Bystrom Tr. 1564)

50. As trading in TRX stock continued on Tuesday, its market price once again began to drop. After hitting $4.34 in the morning, it appears to have dipped below $4.00 at or shortly after 1:30 pm, stabilized around $3.90 until some point after 2:30 pm, then dropped again to slightly below $3.70 before rising to $3.70 at 3 pm. (Dr. Taveras Tr. 1007-08; DX-184, Dr. Taveras Report, pp. 9-10, and exhibit 4 graphing 9/27 TRX intraday trading) Gibson and GISF were not trading TRX stock in the market until 3:01 pm on Tuesday. (Dr. Taveras Tr. 1009) Gibson believed that traders taking short positions in TRX were responsible for pushing down the price from a high that day of $4.34 to $3.70 before GISF's sale. (C. Gibson Tr. 1399-1400) With Gibson and GISF not trading until that point in the afternoon, based on his trading experience, Bystrom concluded that GISF was not responsible for the TRX price going from $4.34 on Tuesday morning down to $3.70 by 3 pm that afternoon. (Bystrom Tr. 1562-63)

51. On Tuesday afternoon, with the TRX price then already at or approaching $3.70, Sands asked Gibson for confirmation that GISF was willing to sell up to 5 million shares for $3.50 or better. Sands said that he did not know if he could "get it all done," and that he would sell "more like 3.5mm shares or so." (DX-82) Bystrom testified that, at that point, there was still no order for GISF to sell TRX shares, but "[t]hat's exactly what [Sands was] asking for. He's asking for [Gibson] to give him the order." (Bystrom Tr. 1560) Gibson then responded to Sands by email and said "Confirm at 3.50 or better up to 5mm shares." (DX-82) Bystrom testified that "[t]hat constitutes an order." This email on Tuesday afternoon was "the first we see of an order." (Bystrom Tr. 1560-61)

52. Sands then phoned Gibson with a specific proposed price of $3.50 for a transaction in the amount of 3.7 million shares. Gibson did not have the authority to conclude a sale of that many shares without specific confirmation from Hull, as Hull confirmed. (Gibson Tr. 1421; Hull Tr. 569-71) The context was that TRX's stock price had "declined 18 percent Thursday, 10 percent Friday, flat on Monday, a little up on Tuesday, then another very significant decline from 4.34 all the way down to 3.70, ... another 14 or 15 percent intraday on 2 million shares of volume." Gibson phoned Hull "to alert him that we had a bid and in the context of this ... perceived falling knife, we felt like it was a bid we should ... realistically consider and, in Jim's judgment, we should take it and I communicated that to [Sands at] Casimir and the transaction was consummated." (Gibson Tr. 1422) Gibson "had Casimir on one phone and Jim on the other and ... it was take it or it's gone bid. They made that clear. So we had a couple of minutes at

most to make a determination and we made a determination I think in one minute to accept it." (Gibson Tr. 1422-23)

53. Minutes later, Sands' firm Casimir reported back that 3,734,395 TRX shares had been sold for GISF at an average price "somewhat above 3.50." (DX-82) TRX then closed up slightly, at $3.54, on Tuesday, and then traded with less volatility over the next five trading days, closing at $3.54, $3.70, $3.59, $3.51, and $3.28 respectively. (JX-1)

54. After 9/27/2011, Gibson continued to have personal exposure and risk to TRX stock through his ownership of an interest in GISF. This gave Gibson an exposure that was "the equivalent of 220,000 shares of TRX value," meaning exposure to the price of TRX. (Dr. Gibbons Tr. 874) Gibson had no indication that the 2,500 TRX shares he sold on Monday, or the 18,900 shares he sold for the Marzullo account, had any impact on the TRX market price on Tuesday. (C. Gibson Tr. 1424)

55. The Division contends that Gibson, by selling his 2,500 TRX shares outside GISF on 9/26/2011 at $4.04, thereby made $1,350 more than if he had waited to sell until GISF sold 3.7 million TRX shares at $3.50 after 3:01 pm on 9/27/2011 – *i.e.* $4.04 minus $3.50, times 2,500 shares. (Dr. Taveras Tr. 1018-19; C. Gibson Tr. 1423) Mason McKnight IV, a GISF investor called by the Division at the hearing, testified that it does not "bother" him that Gibson "made $1,350 without letting ... the other investors know." (Mason McKnight Tr. 795) When confronted by the Division with the fact that he was not contemporaneously aware of Gibson's Monday sales, GISF's largest investor Hull responded that this "was an incidental or small amount of shares and that there were probably good reasons for him to do that," as Gibson "wasn't getting a salary." (Hull Tr. 608-10)

J. Possible Additional Sales by GISF

56. On Friday 9/30/2011, Gibson obtained an agreement by Roheryn Investments SA to facilitate an "open market sale" of 5.9 million shares of TRX for GISF at price of $3.50, with the sales to be conducted over the five trading days in the following week, *i.e.* 10/3-10/7/2011. (RX-92) Roheryn, with its principal Luis Sequeira, was the adviser to the United Arab Emirates investor who already owned "a significant position in TRX." (C. Gibson Tr. 1427-28)

57. Although the 9/30/2011 agreement was for 5.9 million TRX shares, GISF did not then have 5.9 million shares. In order to reach that number, Gibson had to include the approximately 680,000 shares that Hull held separately in a personal brokerage account separate from GISF. The reason for including the separate block of Hull's shares was that "it can be important for a block purchaser to know that there will not be follow-on sales thereafter." (C. Gibson Tr. 1429-30) Sequeira of Roheryn wanted GISF to be in a position to sell GISF's TRX shares and also its affiliates' TRX shares. (C. Gibson Tr. 1435)

58. But this sale transaction with Roheryn never happened. (Hull Tr. 612) Gibson reported to Hull on Wednesday 10/5/2011 that there was "no deal" with Roheryn. Gibson opined that GISF was "going to very likely be best served holding our position," and that he "would assume we are where we are for the next several months." (RX-102) GISF's "thesis" was that there was "tremendous value" in TRX as a result of (i) "the deviation between gold prices and gold shares"; (ii) "the deviation between other gold shares and TRX"; (iii) "the concentrated short position in" TRX stock; and (iv) the prospect that the "large inventory of shares we owned could provide value to a strategic buyer who sought to develop a controlling position in the company." (C. Gibson Tr. 1431-32)

59. Hull replied to Gibson's 10/5/2011 email that GISF should "try to get a higher price for bulk sale of our shares." (RX-102) Hull explained his thinking was that "every day is a different day," and that GISF would try to get as much as it could "if we were going to" sell. This was not saying that he agreed to "any particular price," but that he would "take every situation and try to understand ... and evaluate it." If Hull "felt like we were getting good value," GISF "would try to sell it." (Hull Tr. 615-16) Again on 10/14/2011, Gibson and Hull confirmed that they would not do a sale transaction with Roheryn, with Gibson emailing that "waiting for at least a few weeks ... looks like appropriate path." (RX-104; Hull Tr 616-18)

60. GISF's TRX shares were being held at Casimir Capital in connection with the 9/27/2011 block sale. (DX-82) On 10/17/2011, Gibson asked GISF's brokers at Garwood Securities to "get us able to sell" its remaining 5.9 million TRX shares. But Hull explained that this was subject to Hull viewing any proposal as being at "a good price." (DX-93; Hull Tr. 618-19) On 10/17/2011, GISF did a block sale of 364,495 TRX shares in a privately negotiated transaction at market price. (Dr. Gibbons Tr. 879)

K. GISF's 10/18/2011 Purchase From Hull

61. The second of the Division's three charges against Gibson in this matter is that, despite plans to sell TRX shares, Gibson had GISF buy over 680,000 TRX shares from Hull personally. (OIP ¶33) The Division charges Gibson with "furthering his relationship with" Hull by letting Hull thus sell his shares "without the price depressing impact of a publicly executed sale," and as it was a private sale, allowing him to "avoid paying a sales commission." (OIP ¶¶34-36)

62. It is not disputed that on 10/18/2011, GISF bought 680,636 TRX shares from Hull in a private transaction at $3.60, which was the closing market price that day. (DX-95; Hull Tr. 619-21; C. Gibson Tr. 1435) Is also not disputed that, as this was a private transaction, Hull "didn't pay" a commission, and GISF "didn't pay one either." (Hull Tr. 630) It further appears from RX-105 that Hull sold about 70,000 TRX shares a week earlier in a market transaction, and not to GISF, with prices at higher levels. (RX-105; JX-1; Hull Tr. 633-34)

63. In response to the Court's question whether Hull or Gibson had the idea for Hull to sell these shares to GISF, Hull's recollection was that it was "our idea," and "certainly was in the context of what was best for the fund to dispose of the remaining shares." (Hull Tr. 737) Hull explained that he "wanted to put ... my shares together with the fund shares to have a larger block." (Hull Tr. 627) Hull's "thinking at the time" was "that as a larger block of shares, ... we would have a much greater opportunity to get" a "substantially increased price" in selling GISF's block of TRX shares. (Hull Tr. 624) The "idea" of Hull's sale to GISF was "to try to find a motivated buyer" and was "in preparation for putting a big block together to entice a buyer." (Hull Tr. 638-39) "This did not serve Mr. Hull except insofar as he's a member of the fund. And again, the objective ... was to achieve a block sale which we had independently determined was in the interest of the fund." (C. Gibson Tr. 1438-39)

64. Respondent's expert Daniel Bystrom confirmed that "this action [was] to consolidate the shares in one place, which greatly simplifies the process of entering into a block transaction." Bystrom explained that "the buyer would want to know that he's seeing the whole piece for sale and that would include any affiliates. So getting all of that into one place certainly would make it easier ... to then transact." Further, "because Jim Hull is 81 percent of the fund, and then had this piece in his own account, he's ... a significant affiliate." This made it "just far cleaner to then put up a block or negotiate the price for a block if those shares are all combined," based on Bystrom's 27 years of securities industry experience. (Bystrom Tr. 1567-68)

65. Bystrom further explained: "When negotiating a block transaction, it's important that the seller in this case be able to show to ... the broker and to the buyer that he represents all of the holdings of the entities, and that what they were shopping was what they call a cleanup transaction or they might say I need to see the whole picture. And so in order to see the whole picture, you would have to look at them in combination." (Bystrom Tr. 1622) A cleanup transaction "means there is no more for sale." This includes from a large affiliate like Hull, who owned 81% of GISF and had about 680,000 TRX shares in his personal account. (Bystrom Tr. 1650) It would not include a GISF investor who had only a few thousand TRX shares in a personal account. (Bystrom Tr. 1650-51)

66. The GISF private offering memorandum specified that "purchase and sale transactions ... may be effected between" GISF "and any other entities or accounts," if "for cash consideration at the current market price of the particular securities." (RX-8, p. 19) By purchasing TRX shares from Hull at the closing market price on the day of the transaction, GISF was acting consistently with this provision. "That is exactly what that means." (Bystrom Tr. 1569-70) Executing the transaction "at the closing price of the market on that day ... is the most equitable way to cross that stock." (Bystrom Tr. 1625) "[T]here was no premium or discount to either party." (Bystrom Tr. 1627)

67. Within a short time after GISF bought shares from Hull at $3.60 on 10/18/2011, the shares had increased in value. For example, TRX closed at $3.64 on 10/21/2011, at $3.92 on 10/25/2011, at $3.94 on 10/26/2011, and at $3.96 on 10/27 and 10/28/2011. (JX-1) In the one

week following the 10/18/2011 purchase from Hull at $3.60, GISF saw the price of TRX rise to $4.09 on 10/25/2011 before closing that day at $3.92, so GISF was up at that point. (Dr. Gibbons Tr. 891-92) Hull could have personally profited from this price rise if he had not sold to GISF but instead "sold the shares on the open market." (Hull Tr. 624; Bystrom Tr. 1571-73)

68. As the owner of over 80% of GISF, Hull was essentially selling 80% of his 680,636 shares (or 544,809 of these shares) back to himself. Consequently, he was really disposing of only 135,827 shares, the difference between the 680,636 being sold and the 80% that he would continue to own through the fund. (Bystrom Tr. 1573; Dr. Taveras Tr. 1030) "So I believe firmly that I could have sold my 136,000 shares in the open market and ended up in exactly the same place." (Hull Tr. 625) And likewise the money GISF paid Hull for these shares was 80% Hull's own money as GISF's 80% owner. (Hull Tr. 706; Bystrom Tr. 1573; Dr. Taveras Tr. 1030; Dr. Gibbons Tr. 904-05; C. Gibson Tr. 1439) Throughout, Hull maintained a long exposure to TRX, and his interests remained aligned with GISF, as both were "both rooting for the same outcome," for TRX to go up. (Bystrom Tr. 1568)

69. When GISF ultimately sold these 680,636 shares upon liquidation of its remaining TRX position, it paid a commission of $0.002 per share to its broker Garwood Securities. (C. Gibson Tr. 1440-41) Simple math shows that GISF's commission as to these shares was about $1,360, and that the 9% investors (those apart from Hull and the Gibson group) thus paid about $120 in commissions on the ultimate sale of their portion of the shares bought from Hull weeks earlier on 10/18/2018. (Bystrom Tr.1570-71; C. Gibson Tr. 1441)

70. Mason McKnight IV, an investor called by the Division at the hearing, was asked what his view would be if Gibson proposed having GISF buy Hull's 680,000 TRX shares to help market the fund's TRX portfolio, and then paid Hull the TRX closing market price that day. McKnight responded that it would not "offend" him if Hull "sold his shares to the fund for market price," and that he would not consider this to be a "disservice to ... the other investors." (Mason McKnight Tr. 795-96)

71. On 11/3/2011, GISF did sales of 485,397 shares, 289,100 shares and 8,200 shares of TRX. These sales were at the market price. (Dr. Gibbons Tr. 879-80) And they were executed as market transactions. (C. Gibson Tr. 1455) On 11/8/2011, GISF did another negotiated "upstairs market" block sale of 500,000 shares. (Dr. Gibbons Tr. 880-81) The negotiated price was at or near the market price. (Dr. Gibbons Tr. 884) The sale was to BPI, the Portuguese bank referred to above. (C. Gibson Tr. 1455-56) Again on 11/9/2011, GISF did a sale of 119,971 shares at a price that was near the market price. (Dr. Gibbons Tr. 885)

L. Gibson's Put Purchases

72. The third of the Division's three charges against Gibson in this matter is that, in advance of GISF's sale of its remaining TRX shares on 11/10/2011 in market transactions, Gibson on 10/27, 10/28, 11/2 and 11/8 bought TRX $4 put options for himself and the Marzullo

daughter's account, and advised his father to buy put options. (OIP ¶43-44, 47) The Division contends that "the put contracts represented a short position" in TRX. (OIP ¶45)

73. Buying puts are "not the same thing" as taking a short position. (Bystrom Tr. 1575-76) If the put option is a protective put, where the investor owns the underlying stock, "[y]ou mitigate your loss below the strike price." (Bystrom Tr. 1633) "So buying protective puts gives you much different exposure than short selling. One is long exposure, one is short exposure." (Bystrom Tr. 1633-34)

74. In contrast, puts are "very commonly used" as a hedge. (Bystrom Tr. 1575). As such, they demonstrate "good risk management" and "were in fact invented as a market hedging mechanism." When "used against a long position," puts "can mitigate loss below certain price points while allowing" an investor "to maintain long exposure, particularly through bouts of volatility." Puts act like an insurance policy. (Bystrom Tr. 1574) The Division's expert Dr. Gibbons personally uses options for hedging, and agreed that "[o]ption contracts ... provide insurance. They offer a way for investors to protect themselves against adverse price movements in the future while still allowing them to benefit from favorable price movements." (Dr. Gibbons Tr. 912-13) He further agreed that "a protective put is a put option combined with a long position in the underlying asset." (Dr. Gibbons Tr. 918)

75. A so-called "naked put" is where an investor buys only a put and does not have a long position in the underlying security. Buying a naked put indicates a "bearish" view on the stock. On the other hand, a "protective put" is where the investor buying the put also has a long position in the underlying security. Buying a protective put indicated a "bullish" view on the stock. The investor with the protective put continues to "root .. for higher stock prices, not lower stock prices," and the protective put acts as "the insurance policy." (Bystrom Tr. 1576-78; C. Gibson Tr. 1445)

76. It is undisputed that Gibson had long exposure to TRX stock through GISF, that Giovanni Marzullo had long exposure to TRX stock through GISF, and that Gibson bought TRX $4 puts in his account and in the Marzullo daughter's account on 10/27, 10/28, 11/2 and 11/8/2011. (C. Gibson Tr. 1443) As noted above, the Marzullos were a family unit, and the daughter resided in the family home in New York City while attending graduate school at Columbia. (J. Gibson Tr. 1098; C. Gibson Tr. 1337) It is also undisputed that, on his advice his father Gibson bought protective puts. (J. Gibson Tr. 1100)

77. Buying a "protective put" is "what Chris Gibson did." By buying the put, he protected his interest in the underlying TRX stock. (Bystrom Tr. 1580) Gibson's "exposed long position to TRX ... was through the GISF fund at this point and ... it was to the tune of something above 220,000, might have even been 225,000 shares of TRX." (Bystrom Tr. 1582) Assuming Gibson's puts covered about 20% of his TRX exposure, "he's partially protected his position," which would be "similar" to buying an insurance policy on 20% of a car. (Bystrom Tr. 1582, 1647-48) By hedging 20% of his TRX exposure, Gibson "was naked long." This "didn't even

take him to a neutral position. It certainly did not take him into a position that opposed the other investors in the fund. They all remained aligned and bullish." (Bystrom Tr. 1648) Gibson was "very clearly" bullish. (Bystrom Tr. 1649) Ultimately Gibson's net loss on his TRX exposure was $724,660. (RX-205)

78. During the hearing, the Division's expert appeared to have the same view of the put purchases as Respondent's expert Bystrom. She acknowledged that, after buying puts on 10/27, 10/28, 11/2 and 11/8/2011, Gibson "was long exposed to the stock through his involvement in the Fund." (Dr. Taveras Tr. 1060) The puts Gibson bought can thus be "characterize[d] ... as a protective put," and could be "characterize[d] as a hedge." (Dr. Taveras Tr. 1061) A "protective" put protects an investor's long exposure in the underlying asset. (Dr. Taveras Tr. 1070) Gibson's put purchases protected about a third of his long exposure to the stock. (Dr. Taveras Tr. 1064-65) And the put purchases for the Marzullos protected about 30% of their exposure to the stock. (Dr. Taveras Tr. 1066-67) In the aggregate, it's still a bullish bet on TRX. (Dr. Taveras Tr. 1076-77) The Division's other expert likewise appeared to agree that Gibson "was buying protective puts to hedge his risk on his exposure through the fund to TRX stock," and that would be "hedging." (Dr. Gibbons Tr. 929-30)

79. Gibson began buying the protective puts literally on the day following a 10/26/2011 email from Hull's assistant that required Gibson to sign an updated promissory note to Hull for around $650,000, which focused Gibson on the fact that he was "approximately a 50 cent [TRX] share price move away from being insolvent." (RX-117; C. Gibson Tr. 1445-47) Likewise the Marzullo puts protected only a percentage of their overall TRX exposure. (Bystrom Tr. 1582-83) As noted above, with the Marzullo daughter Francesca Marzullo living with her parents in New York while attending graduate school, she would be viewed as an economic unit with the Marzullo parents, including the father Giovanni Marzullo, a GISF investor. (Bystrom Tr. 1649; C. Gibson Tr. 1337) The parents, Giovanni and Suejin Marzullo, "were elderly," "living on a fixed income," "[redacted]," and "had all of their liquid assets in" GISF. (C. Gibson Tr. 1448) Ultimately the Marzullos lost $965,318 on their TRX exposure. (RX-205) Likewise Gibson's father did not have a short position, was net long in his exposure to TRX stock through GISF, and ultimately Gibson's parents lost $1,399,053 on their TRX exposure. (J. Gibson Tr. 1103-04, 1143-44; RX-205)

80. At any particular time during this period, Gibson could not have had any knowledge of the price direction of TRX stock. This was particularly true given the stock's volatility. (Bystrom Tr. 1587) Throughout the period, Gibson remained in alignment with the other GISF investors. (Bystrom Tr. 1587) By March 2012, TRX was trading above $5, and nobody can know what tomorrow's stock price will be. (Dr. Gibbons Tr. 936-38)

81. Gibson's put purchases did not deprive other GISF investors from buying TRX puts as "there was no scarcity to those puts," and buying protective puts did not hurt GISF. (Bystrom Tr. 1583-84) Buying puts did not change Gibson's "bullish" alignment with GISF investors, as if TRX stock went up, it was good for GISF, Gibson and the Marzullos. (Bystrom Tr. 1584)

82. The Division does not contend that Gibson had a duty at any point to advise GISF's individual investors to buy protective puts to protect their long exposure to TRX stock through GISF's concentrated ownership of TRX. The Division acknowledged to the Court that Gibson's investment advisory clients were GISF itself plus Hull, Gibson's father and the Marzullo daughter. But not the individual investors in GISF. (Tr. 804) The Division's position is that Gibson "owe[d] the fiduciary duty to the fund," and "within that" had to prioritize fund investors' interests and treat them equally. (Tr. 807) "The protective puts purchased by Mr. Gibson did not impact the other investors." (Bystrom Tr. 1606)

83. GISF's 81% owner Hull concluded that Gibson's October and November 2011 purchase of "protective puts on a portion of his investment" was "both morally and legally permissible." Hull pointed to the fact that Gibson "was a young man," who "was willing to bet a lot of money" on GISF but personally "didn't have a lot of money." (Hull Tr. 534) Gibson "had an overall long position and ... took a little bit of money off the table." (Hull Tr. 535) "It was like insurance." (Hull Tr. 663) Hull did not think that Gibson "harmed the fund or that his intention was to harm the fund." (Hull Tr. 536)

M. GISF's 11/10/2011 Sale of TRX Shares

84. On the evening of 11/9/2011, Richard Sands of Casimir Capital summoned Gibson to his office to meet with a representative of the Platinum Partners hedge fund. Sands had said that he had an offer that would make GISF "very pleased." However instead of an offer to buy GISF's TRX shares, Platinum was offering to pay GISF $10,000 per month not to sell any TRX shares for six months. (C. Gibson Tr. 1456-57) Gibson immediately reported this to Hull, and Gibson said they both were "shocked and disappointed." Hull was "very concerned for the reason that why would Platinum want to lock up our shares but for the reason that they may want to sell their shares before we would." (C. Gibson Tr. 1457-58)

85. GISF made "a strategic decision to exit the position" with "the expectation that the other large holders who would be financially incentivized to purchase ... would come in and buy it." (J. Gibson Tr. 1219) As early as 10/6/2011, Hull had suggested a "divide and conquer" strategy to "orchestrate a 'competition' among the potential buyers for our shares," and that "this could be an unique opportunity for someone." (RX-102) When the time came to sell GISF's remaining TRX shares on 11/10/2011, Gibson said that "the other large block holders are going to defend their shares and they're going to buy our stock at an increased price." Hull understood that "our theory was the price was going to be going up because they're going to have to defend their shares and they didn't want the price to go down. What happened was the opposite. All the other large shareholders sold." (Hull Tr. 658-59) While this plan "could potentially tank the stock, ... that was not our plan or theory of the sale." (Hull Tr. 659)

86. Gibson said that he and Hull "evaluated our options and we considered that, and this time, we had far fewer, approximately half the shares at this time that Platinum had, ... less than

half the shares that BPI had, less than half the shares that the [United Arab Emirates investor] had. So three large owners. We've got the smaller position. And that, therefore, we would be in the best position to sell our remaining shares before those large holders. And our view was that if we sold our shares, they would be forced to buy them. It would not be a material increase in the position if it was absorbed by those other three large owners and that they could protect their position." (C. Gibson Tr. 1458)

87. Gibson conveyed his intentions to GISF's broker Dennis Gerecke at Garwood Securities. Gibson emailed that GISF was "going to potentially tank this stock." (DX-105) Gibson said that "a broker like Dennis ... would seek to conceal the footprint ... of its client in the market." If given an order, the expectation would be that the stock would be sold "slowly over time in order to get best execution." But that was "not how we are going to be selling ... in light of what we had learned the previous evening" at the meeting with Platinum in Sands' office. "The strategy that Mr. Hull and I determined was appropriate was for us to sell aggressively in order to signal to the other large shareholders that we were selling and that they needed to make a decision as to whether or not they were going to buy or sell under the theory that given our superior position at the table with far fewer shares than they did, that they would be forced to go ahead and buy our shares. In other words, what I'm trying to communicate to Dennis is ... that when we sell, it is going to be aggressive and it is not his duty in the context of this trade to seek a best execution, conceal our footprints. In fact it's the exact opposite that we want to achieve." (C. Gibson Tr. 1461-62)

88. The next day, 11/10/2011, "was a busy day for TRX." (Dr. Taveras Tr. 1052) After opening at $3.41, it rose slightly to $3.44, but then dropped to $1.56 before closing up at $2.29. (JX-1) GISF sold at an average price of around $2.02. (Dr. Taveras Tr. 1051) "Other market participants were selling too," as GISF's 4.9 million share sales were about 29% of the domestic volume and 22% of the worldwide volume that day. (Dr. Taveras Tr. 1052) Had GISF waited to sell, its TRX shares would have been trading 150% higher, at over $5 per share, four months later, in March 2012. (JX-1; C. Gibson Tr. 1463-64)

89. At the hearing, Gibson admitted that there were some investment decisions taken for GISF that turned out not to be good. He admitted that the decision to go fully into one equity, TRX stock, was in hindsight a bad decision. He admitted that the decision to turn down the August 2011 offer to buy GISF's full position in TRX at $5.85, the then market price, was in hindsight a bad decision. He admitted that the decision on 11/10/2011 to flood the market with GISF's TRX shares in the belief that other large owners would decide to support the TRX stock price by buying GISF's shares did not achieve its intended purpose. But he denied thinking that he was breaching fiduciary duties or taking actions contrary to the best interests of GISF's members. (C. Gibson Tr. 1464-66)

N. Financial Impact on Christopher Gibson

90. There were three sets of transactions involved in this matter – Gibson's sale of a small number of separately held shares on 9/26/2011, Hull's sale of about 680,000 TRX shares to GISF (owned 81% by Hull) on 10/18/2011, and Gibson's purchase of "protective" puts covering only a portion of his TRX exposure (on which he suffered a substantial loss). None of these three sets of transactions adversely impacted the value of the other GISF investors' holdings in the fund. (J. Gibson Tr. 1146)

91. Christopher Gibson has been wiped out financially. Ultimately his investment in TRX caused him to lose about $725,000, caused his parents John and Martha Gibson to lose about $1.4 million, and caused Gibson's friends the Marzullos to lose about $965,000. (RX-205; Cates Tr. 1301-02) The Marzullos losses are treated as a unit "because they were a family." (Cates Tr. 1328) As of 6/30/2019, Christopher Gibson was insolvent, with a negative net worth of $605,073. (RX-240; Cates Tr. 1303-04) Gibson said that "I've been insolvent every day since the 10th of November of 2011." (C. Gibson Tr. 1469)

92. Gibson has also been wiped out professionally. In the words of his father, this proceeding has been "an economic death sentence" for Gibson, and "for the last five years, he has had great difficulty obtaining any form of employment and had to leave the country." He presently works in Montevideo, Uruguay in a non-securities consulting business engaged in marketing companies. (J. Gibson Tr. 1145-46)

II. PROPOSED CONCLUSIONS OF LAW

A. The Investment Advisers Act

93. Section 202(a)(11) of the Investment Advisers Act, in relevant part, defines the term "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities."

94. Section 202(a)(12) defines the term "control" as "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."

95. Section 202(a)(17) defines the term "person associated with an investment adviser" as "any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that for the purposes of section 203 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the

meaning of such term. The Commission may by rules and regulations classify, for the purposes of any portion or portions of this title, persons, including employees controlled by an investment adviser."

96. Section 203(f), in relevant part, provides that "The Commission, by order shall censure or place limitations on the activities of any person associated or seeking to become associated, or at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest ..."

97. Sections 206(1) and (2) provide that "It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any act, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

98. Section 206(4) prohibits an investment adviser from engaging in any act, practice or course of business which is fraudulent, deceptive or manipulative and authorizes the Commission to define and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive or manipulative.

99. Rule 206(4)-8, adopted pursuant to Section 206(4) of the Advisers Act, prohibits an adviser to a pooled investment vehicle from: (1) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in a pooled investment vehicle; or (2) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative with respect to any investor or prospective investor in the pooled investment vehicles.

B. The Securities Exchange Act

100. Section 10(b) of the Securities Exchange Act, in relevant part, provides that it shall be unlawful for any person to use or employ, in connection with the purchase or sale of securities, "any manipulative or deceptive device or contrivance" in contravention of such rules and regulations as the Commission may prescribe as necessary for the protection of investors.

101. Rule 10b-5, in relevant part, provides as follows: It shall be unlawful for any person (a) To employ any device, scheme or artifice to defraud, ...or (c) To engage in "any

act, practice, or course of business which operates or would operate as a fraud or deceit on any person" 17 C.F.R. § 240.10b-5.

C. Investment Adviser Fiduciary Duties

102. Investment advisers have been deemed to be fiduciaries. S*ecurities and Exchange Commission v. Capital Gains Research Bureau, Inc.,* 375 U. S. 180 (1963) ("The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser-consciously or unconsciously-to render advice which was not disinterested."

103. The Investment Advisers Act has been construed as imposing federal fiduciary duties. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 17 (1979) (noting that "§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers"). The federal fiduciary duties to which advisers are subject are not specifically defined in the Advisers Act or the rules thereunder.

104. The Commission issued a release in which it provided its interpretation of the standard of conduct imposed upon investment advisers by the Advisers Act. Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248 (June 5, 2019). The Commission, relying upon *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 17 (1979), interpreted the Advisers Act as imposing a federal fiduciary duty which is based on equitable common law principles and which is fundamental to advisers' relationships with their clients under the Advisers Act. The Commission stated that the federal fiduciary duty imposed upon investment advisers by the Advisers Act is comprised of a duty of care and a duty of loyalty, and precludes an investment adviser from placing its interests ahead of the interests of its client.

105. In interpreting the federal fiduciary duty imposed upon investment advisers by the Advisers Act, the Commission stated that an investment adviser's fiduciary duty "follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." *Id.* at 9. The Commission added that, although an investment adviser owes each of its clients a fiduciary duty under the Advisers Act, the fiduciary duty owed to a particular client must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client. *Id.* at 9-10. With respect to the imposition of limitations on the scope of an investment advisers fiduciary duty, the Commission determined that a contract provision purporting to waive an adviser's federally fiduciary duty generally, such as a statement that the adviser will not act as a fiduciary, a blanket waiver of all conflicts of interest, or a waiver of any specific obligations under the Advisers Act, would be inconsistent with the Advisers Act. *Id.* at 10-11. In articulating its position regarding the application of fiduciary duties in light of the terms of an advisory agreement, the Commission cited § 8.06 of the Restatement (Third) of

Agency which provides as follows: "Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. . . . In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable." *Id.* at 10 n. 29.

106. The Commission included in its interpretation of the federal fiduciary duty the statement that "an investment adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship." In addition, the Commission noted that an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser-consciously or unconsciously-to render advice which is not disinterested. With respect to particular investment opportunities, the Commission stated that when allocating investment opportunities, an investment adviser is permitted to consider the nature and objectives of the client and the scope of the relationship. Further, the Commission stated that "an adviser and a client may even agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to a client." *Id.* at 26 n. 6.

D. The Geier International Strategies Fund

107. The Fund was formed as a Delaware limited liability company on or about December 16, 2009. The Fund's Operating Agreement provided, among other things, that Geier Capital, LLC, a Georgia limited liability company, would serve as the Fund's Managing Member. Section 3.02 of the Operating Agreement provided that the Managing Member shall have the power to retain Geier Group, LLC, a Georgia limited liability company, or such other entity as the Managing Member shall determine to serve as the Fund's investment manager and Geier Capital engaged Geier Group to serve as the Investment Manager for the Fund in January 2010. Geier Group acted as the investment adviser to the Fund from its inception through April 2011, when it was dissolved.

E. Conflicts Were Disclosed and Consented to by GISF and Its Members

108. The Fund's Confidential Private Offering Memorandum disclosed potential conflicts of interest with respect to providing investment advice to others and engaging in securities transactions through personal securities accounts. Specifically, the Offering Memorandum stated that "Under the terms of the Operating Agreement, the Managing Member, the Investment Manager, and each of their respective director, members, partners, shareholders, officers, employees, agents and affiliates (hereinafter referred to as the 'Affiliated Parties') may conduct any other business, including any business within the securities and commodities industries, whether or not such business is in competition with the Company." The Offering Memorandum further disclosed

> As a result of the foregoing, the Affiliated parties may have conflicts of interest in allocating their time and activity between the Company and other entities, in allocating

investments among the Company and other entities and in effecting transactions for the Company and other entities, including ones in which the Affiliated Parties may have a greater financial interest.

109. The Fund's Operating Agreement contained similar disclosures and provisions. The Operating Agreement provided that "Nothing herein contained shall prevent the Managing Member (or any of its affiliates or employees) or any other Member from conducting any other business within the securities industry, whether or not it is in competition with the Company." The Operating Agreement continued, "Without limiting the generality of the foregoing, the Managing Member (or any of its affiliates or employees) may act as investment adviser or investment manager for others, and may serve as an officer, director, consultant, partner, stockholder of one or more investment funds, partnerships, securities firms or advisory firms." The terms of the Operating Agreement govern the internal affairs of the Fund. *Elf Atochem North America, Inc. v. Jaffari,* 727 A.2d 286, 291-92 (Del. 1999).

110. By reviewing the Offering Memorandum and executing the Operating Agreement, Members of the Geier Fund agreed that other Members were permitted to engage in any other business, including any business within the securities industry, whether or not such business is in competition with the Fund; were free to engage in other activities in the securities business, including businesses which compete with the Geier Fund; were free to act as investment adviser or investment manager for others; were free to pursue investment objectives or implement strategies similar to or different than the objectives or strategies of the Geier Fund; were free to invest in securities in which the Fund invests or invest in securities in which the Fund does not invest; were free to give advice or take action that differs from the action taken by the Geier Fund or the advice given to the Geier Fund; and were free to purchase the same securities as the Fund as well as securities in which the Fund did not invest. Further, by becoming Members of the Geier Fund, investors agreed "that in effecting transactions, it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company to take or liquidate the same investment positions at the same time or at the same prices."

111. Members of the Geier Fund further agreed that the Managing Member of the Fund was empowered to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or corporations with which the Managing Member or any other Member is affiliated."

112. As the provisions of the Operating Agreement and the Offering Memorandum clearly and unequivocally disclosed potential conflicts of interest, Respondent was permitted to purchase and sell the same securities that the Fund purchased and sold and to purchase and sell securities that the Fund did not purchase and sell, including TRX securities and put contracts on TRX securities. Accordingly, Respondent cannot be found liable for violating the advisers Act or the Exchange Act by engaging in front running.

113. Similarly, Respondent could not be exposed to liability in connection with Mr. Hull's sale of TRX securities to the Fund as the Operating Agreement specifically provided that the Managing Member could enter into transactions that it deemed advisable, including transactions with persons with which the Managing Member is affiliated.

F. Respondent Gibson Did Not Engage in Front Running

114. Neither the Advisers Act nor the Exchange Act contain a specific prohibition regarding front-running. And neither the Advisers Act nor the Exchange Act contain a definition of the term "front-running."

115. The Commission has described front-running as follows:

> Frontrunning may be defined as involving trading a stock, option or future while in possession of non-public information regarding an imminent block transaction that is likely to affect the price of the stock, option or future.... Certain instances of frontrunning may be analyzed pursuant to Section 10(b) and Rule 10b-5 as a form of insider trading... The Commission has preferred to address this issue by working with the self-regulatory organizations ("SROs") to detect and prosecute frontrunning in these markets as violations of the rules of these SROs. (3/13/1988 "Memorandum Prepared by the Division of Market Regulation in Response to the Questions Contained in the Letter of March 4, 1988" from Representatives Dingell and Markey)

116. And the term "front-running" has been described by the Second Circuit Court of Appeals in *D'Alessio v. SEC,* 380 F.3d 112, 114 (2d Cir. 2004) as follows:

> A broker 'trades ahead' or 'frontruns' when he or she receives a large order for a particular security from an institutional client and, before executing the larger trade, first executes trades in that security for an account in which the broker has an interest so as to anticipate and exploit the movement in price the larger trade is likely to cause.

G. The September 26, 2011 Sales of TRX Securities

117. Front running is the purchase or sale of a security by a person subject to a fiduciary or other legal duty while in possession of material, non-public information regarding an imminent transaction that is likely to affect the price of the same or a related security.

118. At the time Respondent sold TRX securities on September 26, 2011, he did not possess information regarding an imminent transaction by the Fund of which he could take advantage. During August and September 2011 Respondent engaged in discussions with market participants regarding the possibility of a sale of some or all of the Fund's securities.

At the time he placed sell orders on September 26th, Respondent did not know whether the investment banker he contacted would be able to locate a buyer or whether the size of any proposed transaction or the price at which the Fund's TRX securities could be sold would be acceptable to Mr. Hull, who had to approve such a transaction. Thus, the information that Respondent possessed at the time he sold TRX securities on September 26, 2011 was not material under the standard applicable to the federal securities laws. In *TSC Industries Inc. v. Northway, Inc.,* 426 U.S. 438 (1976), the Supreme Court stated that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."

119. The information that Respondent possessed regarding a possible sale of the Fund's TRX securities had been disclosed to market participants and could not be deemed to have been non-public at the time that Respondent sold TRX securities on September 26, 2011. Respondent had engaged in discussions with market participants in August 2011 regarding a block transaction involving the Fund's TRX securities. Such discussions were with an investment banker with which the Fund did not have a relationship. The discussions were not confidential and, thus, Respondent disclosed the Fund's interest in receiving offers regarding its TRX securities to market professionals with an interest in TRX securities. Respondent engaged in further discussions with market participants regarding a sale of the Fund's TRX securities in September 2011. Thus, market participants which had acquired or were interested in acquiring TRX securities were aware that the Fund was exploring a sale of some or all of its TRX securities.

120. Respondent's sales of TRX securities followed the sale of 78,000 TRX shares by the Fund during the prior trading day. On Friday, September 23, 2011, the Fund sold its shares at $4.04 and on Monday, September 26, 2011, Respondent sold TRX shares at the same price. Thus, Respondent sold after the Fund and received the same price per share as the Fund. At the time Respondent sold TRX securities, he was unaware of when or if the Fund would again sell TRX securities. By trading after the fund and at the same price and without knowing if or when the Fund would again trade in TRX securities, Respondent clearly did not place his interests above the Fund's.

121. Even without regard to the disclosures regarding conflicts of interest and Respondent's lack of knowledge of an imminent transaction by the Fund, it is readily apparent that the size of Respondent's trades could not constitute a material conflict of interest. Further, Respondent's trades had no impact on the pricing that the Fund received when it sold TRX shares on September 27, 2011, as the price of TRX shares opened higher on the day after Respondent's trades and increased before the fund sold TRX securities.

H. The Purchase of Put Contracts

122. At the time he purchased, or recommended, the purchase of put contracts on TRX securities, Respondent did not possess information regarding an imminent transaction by the

Fund of which he could take advantage. Rather, Respondent was continuing to explore the possibility of selling the Fund's TRX securities through negotiated transactions in the upstairs market. Further, at the time of the purchases of the put contracts, Mr. Hull had not approved the sale of the Fund's TRX securities. The information regarding a sale of the remaining block of the Fund's TRX securities was not material. *See, TSC Industries, Inc. v. Northway Inc.,* 426 U.S. 438 (1976).

123. Prior to his purchase or recommendation to purchase put contracts on TRX securities, the Fund had engaged in discussions with market participants regarding a sale of some or all of its TRX securities, had sold approximately 3.7 million TRX shares, and had engaged in further discussions regarding sales of additional TRX shares. Thus, market participants were aware that the Fund would consider offers for its remaining block of TRX securities.

124. The put contracts that Respondent purchased were protective puts as he was long TRX securities through his interest in the Fund. Similarly, the puts Respondent purchased through the account maintained by his close friend represented a hedge with respect to the TRX securities her father held through his interest in the Fund. Respondent's close friend lived with her parents and the brokerage account which was opened in her name was funded by her father. Accordingly, Respondent's close friend and her family constituted a single economic unit. Also, Respondent's father, who purchased puts based upon Respondent's recommendation, held TRX securities through his interest in the Fund and also held TRX securities in a personal account.

125. The purchase of the protective puts did not constitute a material conflict of interest, as each of the purchasers held long positions through their interest in the Fund and were always aligned with the Fund. Each of the purchasers of the puts would benefit if the price of TRX securities increased and would suffer losses if the price of TRX shares declined. Moreover, the purchase of the puts did not impact the price of TRX securities and the Fund and other members of the Fund were able to purchase put contracts if they deemed such securities to be appropriate.

I. Gibson Did Not Favor Hull Over the Fund

126. An investment adviser that favors one client over another may violate the antifraud provisions of the Advisers Act. *J.S. Oliver Capital Management, L.P.,* Securities Act Release No. 10100 (June 17, 2016) ("We find that J.S. Oliver and Mausner systematically allocated trades to favored accounts on a disproportionate basis with scienter.). The Commission has also stated that "An adviser need not have pro rata allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients." Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248 (June 5, 2019) at 27.

127. The Fund's Operating Agreement and Offering Memorandum expressly permitted transactions between the Fund and persons affiliated with the Managing Member and the Offering Memorandum provided guidelines for such transactions. The Fund's Operating Agreement at Section 3.02(h) specifically authorized Geier Capital, the Fund's Managing Member, "To enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or corporations with which the Managing Member or any Member is affiliated. The Offering Memorandum contained a guideline for such transactions which provided that purchase and sale transactions may be effected between the Fund and other entities and accounts subject to guidelines that such transactions shall be effected for cash consideration at the current market price of the particular securities and no extraordinary brokerage commissions or fees or other remuneration shall be paid.

128. In any event, the Hull Transaction complied with the provision set forth in the Offering Memorandum as the transaction was effected at current market prices and no extraordinary commissions or other remuneration was paid.

129. The transaction between the Fund and Mr. Hull complied with the guideline contained in the Offering Memorandum as the transaction was effected at the price at which TRX closed on the day the agreement between Mr. Hull and the Fund was executed. Further, the transaction was effected without any commission being paid by either party, so that an extraordinary commission was not paid.

130. The purpose of the Hull Transaction was to avoid any adverse consequences to the Fund that might develop from Mr. Hull's efforts to sell securities in the market at the same time that the Fund was exploring the sale of the sale of its remaining block of TRX securities. Mr. Hull entered into the transaction in order to accommodate the Fund. Mr. Hull could have sold his TRX shares in the market and increased his liquidity by approximately $2,500,000, but agreed to accommodate the Fund's request and increased his liquidity by only $500,000 as he experienced 80% of the decrease in the Fund's cash.

131. In addition, the transaction did not favor Mr. Hull over the Fund. As Mr. Hull's ownership in the Fund was approximately 80% of the Fund, he experienced 80% of the losses that the Fund incurred when it sold its TRX shares on November 10, 2011. Moreover, any adverse consequences resulting from a Fund transaction also affected Respondent and those close to him as they represented approximately 10% of ownership interests in the Fund. As a result, approximately 90% of the impact of any developments regarding the Fund affected Mr. Hull and Respondent.

132. To the extent that a commission was incurred by the Fund when it ultimately sold its remaining block of TRX securities on November 10, 2011, the commission was incurred in a separate transaction and the commission that was paid was not extraordinary as the

commission paid on shares acquired from Mr. Hull was the same as the commission paid with respect to all of the shares that the Fund had acquired from other sources

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J. Gibson Did Not Violate Section 206(4) and Rule 206(4)-8

133. Section 206(4) prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive or manipulative.

134. Rule 206(4)-8, adopted pursuant to Section 206(4) of the Advisers Act, prohibits an adviser to a pooled investment vehicle from (1) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to any investor or prospective investor in a pooled investment vehicle; or (2) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

135. In the context of Section 206, a misrepresented or omitted fact may be deemed material if it would be significant to a reasonable client or prospective client's evaluation of the adviser's integrity or fidelity to his clients. *See SEC v. Householder,* 2002 WL 1466812, *6 (N.D. Ill. July 8, 2002); *In re Paul Edward Ed Lloyd, Jr., CPA*, SEC Release No. 840, 112 SEC Dkt. 190 (July 27, 2015). As the OIP alleges that "[f]rom January 2010 to early 2013, Gibson acted as the Fund's investment adviser, initially as the principal executive of Geier Group and then in his personal capacity after Geier Group's termination" the termination the Fund's investment adviser would not be material. Similarly, in light of the OIPs allegations, the termination of Geier Capital as the Managing Member of the Fund is immaterial.

136. To the extent that the OIP may be read to allege a violation of Section 206(4) and Rule 206(4)-8 based upon the solicitation of two investors to make or increase their investments in the Fund with materials stating that Geier Group was registered as an investment adviser notwithstanding that its registration had lapsed, such a claim would be barred by the statute of limitations.

137. Rule 206(4)-8 prohibits an investment adviser from making an untrue statement of material fact or omitting a material fact necessary to make the statements made not misleading. The rule does not affirmatively require an investment adviser to make statements to investors or potential investors. Moreover, the rule does not establish a fiduciary relationship between an investment adviser and investors or prospective investors, which relationship might require disclosure of material information to investors or prospective investors.

138. Respondent cannot be found to have violated Rule 206(4)-8 as the disclosures provided to investors stated that Respondent could have a securities brokerage account, that Respondent could advise others with respect to securities brokerage matters and could trade,

and that it might not be possible or consistent with investment objectives of the various persons or entities to take or liquidate the same investment positions at the same time and at the same prices. As the Operating Agreement is binding on the Fund and its Members, the Members of the Fund have consented to Respondent's sales of TRX securities and purchases of put options.

139. As Respondent did not engage in front running, accordingly, he could not be obligated to disclose that he engaged in front running.

140. Respondent was not obligated to disclose the Hull Transaction to Fund investors because Section 3.02(h) of the Operating Agreement specifically authorized the transactions such as the Hull Transaction. As the Members of the Fund consented to transactions such as the Hull transaction when they signed the Operating Agreement, further notification of such a transaction was not required.

K Respondent Did Not Act With the Requisite Mental State

141. Section 206(1) and Section 10(b) and Rule 10b-5 require proof of scienter, while Section 206(2) and 206(4) and Rule 206(4)-8 require proof of negligence. Scienter is shown by facts demonstrating, "a mental state embracing intent to deceive, manipulate, or defraud." SEC v. Rubera, 350 F.3d 1084, 1094 n. 1(9th Cir. 2003) (citations omitted.) It may also be established by recklessness, which is: highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. Id. To establish negligence, the SEC must show that Mr. Gibson had no reasonable basis for his actions. "Negligence is not a strict liability standard[,] but "requires the absence of a reasonable basis." *SEC v. Morris*, No. CIV.A. H-04-3096, 2007 WL 614210, at *3 (S.D. Tex. Feb. 26, 2007) (citing *Weiss v. SEC*, 468 F.3d 849, 855 (D.C.Cir.2006); *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 854 (9th Cir.2001).)

142. As the Offering Memorandum and the Operating Agreement contained extensive disclosures regarding potential conflicts of interest, and as Respondent Gibson was aware of the disclosures contained in those documents and as the documents specifically permitted the transactions in which Respondent engaged he could not have acted recklessly or negligently in failing to disclose such matters.

143. As Respondent Gibson did not engage in front running or favor Mr. Hull over the Fund in violation of the Investment Advisers Act or the Securities Exchange Act or rules thereunder, he could not have acted recklessly or negligently in failing to disclose such matters.

L. Sanctions and Relief

144. In determining whether and which sanctions should be imposed, an administrative law judge must weigh several factors. Such factors include:

> The egregiousness of respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

145. With respect to the egregiousness of respondent's actions, a preponderance of the evidence established that Respondent did not engage in egregious conduct. In fact, the evidence offered at the hearing established that Respondent did not violate the securities laws. First, the evidence offered at the hearing established that conflicts of interest relating to Respondent's securities transactions were disclosed and consented to by the Fund. Second, evidence presented at the hearing established that Respondent did not engage in front-running, did not favor a Fund investor over the Fund, and did not violate Section 206(4) and Rule 206(4)-8. Moreover, the evidence admitted at the hearing establishes that Respondent's interests were always aligned with the Fund, his transactions did not harm the Fund, and he suffered losses that, on a relative basis, exceeded the losses of other Fund investors. Thus, Respondent did not place his interests above the Fund.

146. With respect to the isolated or recurrent nature of the infraction, the evidence admitted in this matter establishes that the Fund commenced operations in January 2010 and the activities at issue occurred in September, October and November 2011. Approximately eight years have passed since the relevant events, and there have been no allegations of misconduct by Respondent during that period.

147. With respect to the degree of scienter involved, the evidence admitted during hearing established that Respondent engaged in activities that were addressed in the Fund's Offering Memorandum and Operating Agreement and that he undertook the actions at issue with the understanding that they were permitted by the Fund's Offering Memorandum and Operating Agreement Respondent's transactions in TRX securities and TRX put contracts did not harm the Fund and the Hull transaction was believed to be in the interest of the Fund as opposed to the interest of Mr. Hull; and that the actions either did not harm the Fund or benefitted the Fund;

148. With respect to Respondent's sincerity, recognition of the nature of his conduct and the likelihood that his occupation will present opportunities for violations, the evidence admitted during the hearing establishes that Respondent has taken extraordinary steps. Since the relevant events, Respondent has pursued non-securities employment outside of the United States. Respondent clearly recognizes the seriousness of this matter and the Division's charges.

149. In light of the foregoing, sanctions and relief such as a suspension or a bar or a cease-and- desist order are wholly inappropriate. In addition, relief such as disgorgement or a monetary penalty are inappropriate as the evidence admitted during the hearing establishes that Respondent did not realize any profits in connection with his transactions involving TRX securities or put contracts on TRX securities and, in fact, suffered considerable losses on such transactions. Moreover, Respondent is unable to pay disgorgement or a civil penalty.

150. Sanctions and relief predicated upon Section 203(f) of the Advisers Act is inappropriate for an additional reason. Section 203(f) provides that the Commission's administrative jurisdiction extends to persons who are or are seeking to become associated with an investment adviser or a person who was associated or seeking to become associated at the time of the alleged misconduct. While the OIP alleges that Respondent was an officer of Geier Group, the investment manager of the Fund the OIP further alleges that Geier Group, a Georgia limited liability company, was terminated in April 2011, which was prior to the conduct that has been alleged as constituting violations of the Advisers Act. As the Division failed to offer any proof that Respondent was associated or seeking to become associated with an investment adviser or is now associated or seeking to become associated with an investment adviser, no sanctions or relief may be predicated upon Section 203(f) of the Advisers Act.

Dated: September 13, 2019

/s/ Thomas A. Ferrigno

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Certificate of Service and Filing

Pursuant to Rule 150(c)(2), I certify that on September 13, 2019, I caused the foregoing to be sent: **(1)** By **Facsimile** transmission and by **FedEx (original and 3 copies)** directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090, with a copy by **email** to apfilings@sec.gov. **(2)** By **email** to the Honorable James E. Grimes, Administrative Law Judge, Securities and Exchange Commission, at alj@sec.gov. **(3)** By **email** to Gregory R. Bockin and Nicholas C. Margida, Securities and Exchange Commission, at bocking@sec.gov and margidan@sec.gov.

/s/ Thomas A. Ferrigno